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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 889

MRS. AGNES JUNE DILLARD,
Petitioner,

vs.

JACKSON'S ATLANTA READY MIX CONCRETE COMPANY, INC.,
Respondent.

REPLY BRIEF TO PETITION FOR CERTIORARI.

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REPLY BRIEF TO PETITION FOR CERTIORARI.

Comes now Jackson's Atlanta Ready Mix Concrete Company, Inc., Respondent, and shows the court in response to the within petition and by way of amplification the following:

REFERENCE TO THE OFFICIAL REPORTS:

This case is reported as 105 Ga. App. 607, January Term, 1962. The Court of Appeals of Georgia.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Article VI—Paragraph IV of the Constitution of the State of Georgia 1945, 2-Ga. Code Ann. 3704.

"The Supreme Court shall have no original jurisdiction but shall be a court alone for the trial and correction of errors of law from the superior courts and the city courts of Atlanta and Savannah, as existed on August 16, 1916, and such other like courts as have been or may hereafter be established in other cities, in all cases that involve the construction of the Constitution of the State of Georgia or of the United States. . . ."

USCA-28-1257 FCA, Title 28, Section 1257.

Final judgments and decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn into question or where the validity of a State statute is drawn in question of the grounds of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the Federal question is properly raised.

(2) Assuming that the Federal question is properly raised whether the petitioner for Certiorari presents the question for review.

STATEMENT OF THE CASE.

To the petitioner's in Certiorari statement of the case should be added, that the judgment complained of is an affirmance of a jury verdict, which has been approved by the trial judge and by the Court of Appeals, on review, on the basis of there being simply a question of fact for the jury as to whether Jackson's Atlanta Ready Mix Concrete Company, Inc., did or did not have an assumed or trade name and whether it was one and the same as the defendant in fi fa. Thereafter, and in the appellate court, the constitutional question was raised along with other questions in a motion for rehearing. An application for certiorari was made to the Supreme Court, of the State of Georgia, seeking to review the decision of the Court of Appeals of Georgia and certiorari was denied. Thereafter a motion for rehearing was made on the denial, and a "supplement to or a condensation of the motion of petitioner for reconsideration of the denial of her petition for certiorari" was filed. This was the last pleading filed in any court in the state of Georgia in this case and it did not argue or present any question under the Constitution of the United States or of the State of Georgia: but it simply alleged in numbered paragraph 12 "Panel Three of the Court of Appeals committed many other serious errors of great public concern requiring the grant of Writ of Certiorari as pointed out in the petition for certiorari and motion for reconsideration, but in the interest of brevity they will not be referred to in this paper because the foregoing grave errors of public concern require the grant of a Writ of Certiorari without even considering the other assignments of error."

ARGUMENT.

This court has held that a mere assertion in a state court of a Federal right in a petition for rehearing affords no grounds for invoking the jurisdiction of the Supreme Court unless the court below, in dealing with the petition passed upon the Federal ground relied upon. **Bowe v. Scott**, 233 U. S. 658, 58 L. Ed. 1143, 34 S. C. R. 769; and the Federal question must have been set up at the proper time and the proper way. **Chappell v. Bradshaw**, 128 U. S. 132, 32 L. Ed. 369, 9 S. C. R. 40.

Georgia courts have held from the case of **Epps v. State**, 19 Ga. 102, 123 (1955), to the case of **Veasey v. State**, 216 Ga. 775, 777 (1961), and apparently are still so holding that a question not raised in the lower court is not considered on review. Relying on the section of the Georgia Constitution quoted above the appellate courts of Georgia consistently holds that they sit to review rulings and will not consider questions on which no rulings were made by the trial judge. **McDonald v. Wimpy**, 206 Ga. 270, 56 S. E. (2) 4524 (19); **Foster v. Phinizy**, 121 Ga. 673, 49 S. E. 865 (1905).

In the instant case the petitioner for certiorari in her Bill of Exceptions asserted that the Court of Appeals had jurisdiction of the review, as the case was not one in which the Supreme Court has exclusive appellate jurisdiction. This was in essence an assertion on her part that no substantial constitutional question was involved. Ga. Code Ann. 2-3704.

Petitioner cites the case of **Williams v. The State of Georgia**, 349 U. S. 375, 99 L. Ed. 1161, 75 S. Ct. 814 (1954). That case is not a case in which the constitutional question was raised on review, but one in which it was raised in extraordinary motion for new trial **and was ruled on by the trial court.**

The case of **American Surety Company v. Baldwin**, 287 U. S. 156, 77 L. Ed. 231 (1932), holds that a writ of cer-

tiorari to review a judgment of a state court will be dismissed where the Federal claim was not reasonably made in the state court.

There is no contention by petitioner, at any point, that this question was ever raised in the trial court. She affirmatively shows that it was not suggested until a motion for rehearing in the first appellate court. She suggests no reason, legal, logical or otherwise why it could not have been raised sooner. Her complaint, if it be so denominated, appears to address itself more to the Court of Appeals than the trial court.

The decision of the Court of Appeals under attack clearly shows that a question of fact existed and was resolved against petitioner.

For the foregoing reasons it is respectfully submitted: Firstly, that the Constitutional question was not reasonably raised. Secondly, that the constitutional questions were abandoned before the petitioner in certiorari concluded her quest through the State courts. Thirdly, that the case simply presented a question of fact that was resolved against petitioner by twelve jurors, and their finding was approved by one trial Judge, three court of Appeal Judges, twice, then nine Court of Appeal Judges, and finally nine Georgia Supreme Court Justices twice on application for certiorari and motion to reconsider.

Respectfully submitted,

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HOSEA ALEXANDER STEPHENS,
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Ready Mix Concrete Company,
Inc.
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Atlanta, Georgia.

Of Counsel:

SCOTT WALTERS, JR.,
WAVELYN E. SMITH.

of the Court of Appeals of Georgia, and that paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

MORGAN THOMAS, Clerk.

Georgia, Fulton County.

I, G. Seals Aiken, Attorney for Petitioner in Certiorari in the foregoing case, acknowledge service of a copy of the within and foregoing reply brief to said petition for certiorari and all further service is hereby waived.

This .... day of September, 1962.

.....

G. Seals Aiken,
Attorney for Petitioner in Certiorari Agnes June Dillard.